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IN THE
COURT OF APPEALS OF INDIANA

ROBERT SPEARS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0708-CR-696
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Michael Jenson, Judge
Cause No. 49G20-0510-FB-184297

September 25, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Robert Spears appeals his convictions and twenty-eight year sentence for one count of Class B felony dealing in a controlled substance and one count of Class C felony dealing in a controlled substance. We affirm in part, reverse in part, and remand.

Issues

Spears raises four issues, which we reorder and restate as:

I. whether the trial court properly admitted evidence recovered after Spears's arrest;

II. whether the trial court properly admitted a recording of a controlled buy;

III. whether there was sufficient evidence to rebut Spears's entrapment defense; and

IV. whether Spears's sentence is inappropriate.

Facts

The evidence most favorable to the convictions is that Spears regularly sold tablets of hydrocodone (Vicodin) and alprazolam (Xanax) to his niece, Shannon Welsh, for over a year. Welsh also occasionally sold pills she obtained from Spears to other persons and gave the proceeds to Spears. Welsh knew that Spears had his prescriptions for the drugs filled towards the end of each month, and the two would arrange to meet shortly thereafter for Welsh to obtain some pills. Sometimes Welsh initiated the contact, and sometimes Spears did.

At some point, Welsh and her family obtained a protective order against Spears because of allegedly threatening behavior towards them. Welsh and her family contacted

law enforcement for assistance with Spears's alleged threats. Indianapolis Metropolitan Police Department ("IMPD") Detective Noble Duke met with Welsh and her family several times to discuss Spears. At one of these meetings, Welsh told Detective Duke about Spears selling controlled substances. Eventually, Welsh agreed to make a controlled buy of drugs from Spears as a way "to try to help [Welsh's family] with their problems." Tr. p. 286.

On October 25, 2005, Welsh contacted Detective Duke to let him know that Spears probably had medication in his possession. Welsh went to an IMPD district office, where she was thoroughly searched by a female officer. Officers also thoroughly searched Welsh's vehicle. No contraband was found on Welsh or in her car. She was given money that was photocopied beforehand and outfitted with a transmitting device.

Welsh drove directly to Spears's home in Indianapolis, followed by IMPD officers. Detective Duke parked where he could see the rear of Spears's home and another group of officers were parked where they could see the front. When Welsh pulled up to Spears's house he was standing outside. Welsh asked Spears if he had any pills, and Spears responded that he wanted to drive around the block to see if there were any police officers observing them. Spears drove around the block in his truck, with Welsh following in her car. Officers observed Welsh driving, although they temporarily lost sight of her at one point. At the end of the block, Welsh drove up beside Spears and told him she did not see anybody, and they both drove back to Spears's house and went inside.

No one else was inside the home aside from Welsh, Spears, and Spears's four-year-old son. Officers could not directly see Spears's back door for some of the time Welsh was inside, but over the transmitter they heard no one enter the house while Welsh was there. Welsh again asked if Spears had any pills for sale, and he said that he did. She requested ten Xanax and six Vicodin pills, which he gave to her in exchange for fifty dollars.

Welsh then left and drove directly to a pre-arranged location, followed by Detective Duke. Welsh gave Detective Duke six pills containing hydrocodone, a schedule III controlled substance, and nine pills containing alprazolam, a schedule IV controlled substance. A search of Welsh and her vehicle uncovered no other contraband. Police then went to Spears's house and arrested him. During a search incident to arrest, officers found on Spears's person two prescription bottles containing hydrocodone and alprazolam, and cash that matched the buy money provided to Welsh.

The State charged Spears with Class B felony dealing in a schedule III controlled substance and Class C felony dealing in a schedule IV controlled substance. Spears moved to suppress evidence recovered after his arrest, contending the arrest was not supported by probable cause because the controlled buy was not conducted properly. The trial court denied the motion to suppress.

At trial, Spears renewed his objection to the introduction of evidence—the prescription pill bottles and cash—recovered during the search incident to arrest. Spears also objected to the introduction of a recording of the audio transmissions during the controlled buy on the basis that it was largely inaudible. The trial court overruled the

objection, and also permitted a transcript of the recording to be provided to the jury while it was played in court, but the transcript was not introduced into evidence. Before the recording was played, Spears requested that it be played in its entirety. Later, Spears requested the jury to be admonished that some parts of the recording were inaccurate; Spears was concerned about references to other alleged criminal activity by him. The trial court refused to give the admonishment, noting that Spears had requested that the entire recording be played to the jury.

The jury found Spears guilty as charged. The trial court sentenced Spears, who has an extensive criminal history, to a maximum twenty years for the Class B felony conviction and a maximum eight years for the Class C felony conviction, to be served consecutively. Spears now appeals.

Analysis

I. Admission of Evidence— Search Incident to Arrest

The first issue we address is whether the trial court properly admitted evidence police found on Spears's person after his arrest. Although Spears filed a motion to suppress, he proceeded to trial after denial of that motion; thus, the sole claim now is whether the trial court abused its discretion in admitting the evidence. See Kelley v. State, 825 N.E.2d 420, 425 (Ind. Ct. App. 2005). An abuse of discretion occurs if a decision is clearly against the logic and effect of the facts and circumstances before the court. Id. at 427. In reviewing the trial court's ultimate ruling on admissibility, we may

consider the foundational evidence from the trial as well as evidence from the motion to suppress hearing that is not in direct conflict with the trial testimony. Id.

Spears does not dispute that a search incident to arrest is an exception to the Fourth Amendment's warrant requirement. See Black v. State, 810 N.E.2d 713, 715 (Ind. 2004). The basis of Spears's objection to this evidence is that police did not adequately supervise the controlled buy, which supplied the probable cause for his arrest. The requirements of a controlled buy are as follows:

> A controlled buy consists of searching the person who is to act as the buyer, removing all personal effects, giving him money with which to make the purchase, and then sending him into the residence in question. Upon his return he is again searched for contraband. Except for what actually transpires within the residence, the entire transaction takes place under the direct observation of the police. They ascertain that the buyer goes directly to the residence and returns directly, and they closely watch all entrances to the residence throughout the transaction.

Iddings v. State, 772 N.E.2d 1006, 1012 (Ind. Ct. App. 2002), trans. denied (quoting Methene v. State, 720 N.E.2d 384, 389-90 (Ind. Ct. App. 1999)).

Here, before the controlled buy took place, Welsh's person was thoroughly searched by a female officer, and her car also was searched. Police found no contraband, and fitted Welsh with an audio transmitter so they could overhear what she and persons near her were saying. Police also followed Welsh as she drove directly, without stopping, to Spears's house. After arriving there, Welsh followed Spears around the block as he looked for police officers. Police apparently briefly lost sight of Welsh during this trip, but were able to continue listening to her over the transmitter. Welsh had

no contact with anyone other than Spears. After arriving back at Spears's home, Spears and Welsh and Spears's young son went inside. Police did not see anyone else go into the house or hear anyone else over the transmitter. Detective Duke did briefly lose sight of the rear door to Spears's house, when he moved his car to avoid detection. However, he still was able to see Spears's backyard. After Welsh left Spears's house, police followed her as she drove directly, without stopping, to a pre-arranged location. There, Welsh turned over the drugs, and a pat-down type of search of her person and full search of her car failed to uncover any other contraband.

Spears seems to contend that the police officers' observation of the controlled buy was not perfect, in part because of their briefly losing sight of Welsh as she drove around the block and not being able to see the rear door of Spears's house for a brief period of time. However, the controls over a buy need not be absolutely perfect. Adequacy of the controls goes to the weight and credibility of the evidence presented, not the burden of proof or admissibility of the evidence. See Hudson v. State, 462 N.E.2d 1077, 1083 (Ind. Ct. App. 1984). We conclude the controls in this case were more than adequate, despite minor gaps in the officers' observations. To the extent Spears contends Welsh was not a reliable informant whose credibility the police were entitled to trust, reliability of an informant need not be established where police officers observe an adequately controlled buy. See Methene, 720 N.E.2d at 389-90. Such was the case here. The trial court did not abuse its discretion in admitting the evidence police recovered incident to Spears's arrest, which was based on the controlled buy.

II. Admission of Evidence— Recording of Controlled Buy

Spears also contends the trial court erred in allowing the State to introduce a recording of the audio transmissions during the controlled buy. To properly admit an audio recording made in a non-custodial setting, the following foundational requirements must be established: (1) the recording must be authentic and correct; (2) the testimony elicited must have been freely and voluntarily made; (3) the recording must not contain matter otherwise not admissible into evidence; and (4) the recording must be of such clarity as to be intelligible and enlightening to the jury. Coleman v. State, 750 N.E.2d 370, 372-73 (Ind. 2001). It is within the trial court's discretion to determine whether a recording meets these criteria. Id. at 373.

Spears's argument focuses primarily upon whether the recording was sufficiently intelligible. Not every word of a recording need be intelligible for it to be admissible. Dearman v. State, 743 N.E.2d 757, 762 (Ind. 2001). Rather, the recording, taken as a whole, must be of such clarity and completeness as to preclude speculation in the minds of the jurors as to its content. Id. "[T]he standard of quality expected of a recording in an interrogation room cannot be used to judge a recording of a person wearing a wire transmitter." Kidd v. State, 738 N.E.2d 1039, 1042 (Ind. 2000).

Here, the State essentially concedes that not every single word on the recording is intelligible. However, the State contends that enough of the recording is intelligible, particularly with respect to the controlled buy, as to make it enlightening to the jury and preclude speculation. The trial court, after listening to the recording, determined that it

was sufficiently intelligible to be admissible. After listening to the recording ourselves, we cannot say the trial court abused its discretion in reaching that conclusion.

Spears also contends the trial court erred in allowing the jury to view a transcript of the recording. Trial courts may, in their discretion, allow the use of a transcript as an aid for jurors in understanding taped statements. Tobar v. State, 740 N.E.2d 106, 107 (Ind. 2000). If a transcript is used as an aid, the trial court should instruct the jury that the transcript should not be given independent weight and that jurors should rely on what they hear rather than on what they read, if there is a conflict between the recording and the transcript. Id. Although transcripts should not ordinarily be admitted into evidence unless both sides stipulate to their accuracy and agree to their use as evidence, the use of a transcript to assist jurors in understanding a recording that is played simultaneously is proper. Id.

Here, the trial court did not admit the transcript into evidence. Instead, it merely allowed the jury to use the transcript as an aid while the recording was played simultaneously. It also instructed the jury that the evidence was the recording itself, not the transcript, and that any decision the jury made should be based on what they heard. The use of the transcript in this fashion, and not as independent evidence, was appropriate.

Finally, Spears argues the trial court should have additionally admonished the jury that some of the statements on the recording might have been inaccurate, particularly with respect to mention of other crimes Spears might have committed. We note that at trial the State offered to play a redacted version of the recording, and present a redacted

transcript, that omitted reference to matters extraneous to the controlled buy. Counsel for Spears, however, insisted that the entire recording be played to the jury. We conclude that Spears invited any error on this issue. Under the invited error doctrine, a party cannot take advantage of an error that he or she commits, invites, or which is the natural consequence of his or her own neglect or misconduct. Wright v. State, 828 N.E.2d 904, 907 (Ind. 2005). Spears, having insisted that the jury be exposed to the allegedly inaccurate or prejudicial information in the recording when the State offered a redacted version of the recording, should not now be permitted to complain that the trial court should have admonished the jury with respect to that information.

III. Entrapment

Next, we address Spears's argument that there was insufficient evidence to rebut his entrapment defense. We apply the same standard of review to claims of entrapment as we do to any challenge to the sufficiency of evidence. Ferge v. State, 764 N.E.2d 268, 270 (Ind. Ct. App. 2002). That is, we consider only the evidence supporting the verdict and all reasonable inferences from that evidence. Id. We will not reweigh evidence or judge the credibility of witnesses. Id. We will uphold a conviction if there is substantial evidence of probative value from which a reasonable trier of fact could infer that the appellant was guilty beyond a reasonable doubt. Id.

Indiana Code Section 35-41-3-9 provides:

> (a) It is a defense that:
>
> > (1) the prohibited conduct of the person was the product of a law enforcement officer, or his agent,

> using persuasion or other means likely to cause the person to engage in the conduct; and
>
> (2) the person was not predisposed to commit the offense.
>
> (b) Conduct merely affording a person an opportunity to commit the offense does not constitute entrapment.

The defense of entrapment turns upon whether the intent to commit a crime originated with the defendant. Espinoza v. State, 859 N.E.2d 375, 385 (Ind. Ct. App. 2006). "The State may rebut this defense either by disproving police inducement or by proving the defendant's predisposition to commit the crime." Id. If a defendant establishes police inducement, the burden shifts to the State to demonstrate the defendant's predisposition to commit the crime. Id. "The State must prove the defendant's predisposition beyond a reasonable doubt." Id.

The evidence in this case most favorable to the convictions was that Welsh regularly purchased drugs from Spears for over a year before the controlled buy on October 25, 2005. Sometimes, Welsh sold the drugs to third persons, then gave the money to Spears. Spears also often initiated the drug sales. The sale on October 25, 2005, merely was a continuation of that regular activity. There also was no indication in the transmitter recording that Spears was in any way surprised by Welsh's request to purchase drugs during the controlled buy or that Spears was hesitant to sell them. At most, the controlled buy merely provided an opportunity for Spears to commit a crime, which does not constitute entrapment. See I.C. § 35-41-3-9(b). Spears essentially is requesting that we reweigh evidence and judge witness credibility, and to accept his trial

testimony over Welsh's. We cannot do so. See Ferge, 764 N.E.2d at 270. There was sufficient evidence to support the jury's rejection of Spears's entrapment defense.

IV. Sentence

The final issue before us is whether Spears's aggregate twenty-eight year sentence is inappropriate.[1] Indiana Appellate Rule 7(B) provides that we may revise a sentence if we find that it is inappropriate in light of the nature of the offense and the character of the offender. Although Rule 7(B) does not require us to be "extremely" deferential to a trial court's sentencing decision, we still must give due consideration to that decision. Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We also understand and recognize the unique perspective a trial court brings to its sentencing decisions. Id. "Additionally, a defendant bears the burden of persuading the appellate court that his or her sentence is inappropriate." Id.

After reviewing Spears's character, we have no hesitation in concluding that his maximum sentences for Class B felony and Class C felony dealing in a controlled substance are justified. His criminal history alone warrants that conclusion. That history dates back to 1983 and includes at least sixteen convictions for various offenses, three

[1] Our revision of Spears's sentence makes it unnecessary to address his claim that Blakely v. Washington precluded the imposition of consecutive sentences. Additionally, Spears's argument regarding single episodes of criminal conduct is inapplicable here. Where a defendant is convicted of multiple non-violent offenses, the single episode of criminal conduct rule prohibits courts from imposing an aggregate sentence exceeding the advisory sentence for the felony class above the most serious felony of which the defendant was convicted. The most serious felony of which Spears was convicted was a Class B felony; the advisory sentence for a Class A felony is thirty years; thus, Spears's twenty-eight year sentence did not violate this rule. See I.C. §§ 35-50-1-2(c); 35-50-2-4.

probation revocations, and multiple disciplinary violations during previous incarcerations.

We conclude, however, that the nature of these offenses dictates the imposition of concurrent, not consecutive, sentences. Our supreme court has held that where a defendant is convicted of committing virtually identical crimes that are close in time and the result of a law enforcement sting operation, it is improper to impose maximum and consecutive sentences for those convictions. Beno v. State, 581 N.E.2d 922, 924 (Ind. 1991). The court in Beno revised the defendant's sentence to concurrent terms. Id. Beno arose under the "manifestly unreasonable" rule for sentence revision that was more deferential to sentencing decisions than the current "inappropriate" standard. See Hope v. State, 834 N.E.2d 713, 720 (Ind. Ct. App. 2005).

The Beno court did state that if the defendant "had provided a different type of drug during each buy, the consecutive sentences imposed might seem more appropriate." Beno, 581 N.E.2d at 924. This court, however, later identified that statement as non-binding dicta. See Hendrickson v. State, 690 N.E.2d 765, 767 (Ind. Ct. App. 1998). In Hendrickson, law enforcement conducted several controlled buys, close in time, during which the defendant sold marijuana, methadone, and two different legend drugs. The trial court had imposed consecutive sentences for each set of convictions related to the marijuana, methadone, and legend drugs, but this court revised the sentence to concurrent terms across the board. Id. We stated, "the purpose of Beno in prohibiting consecutive sentences when the police entice additional drug buys, applies whether or not different

drugs are involved. Therefore, we conclude that the holding in Beno is applicable even if the defendant provides a different type of drug during additional buys." Id.

Here, unlike in Hendrickson, there was just one controlled buy, during which Spears sold two different kinds of prescription medication to Welsh at her request. We also observe that Welsh's agreement to serve as a confidential informant appears to have come about as a result of her desire to settle a personal dispute she and her family had against Spears. That does not excuse the illegality of Spears's conduct, but it does factor into our assessment of the nature of the offenses. Given this background to the case, as well as cases such as Beno and Hendrickson frowning upon allowing the State to "pile on" sentences where multiple convictions have resulted from a police sting operation, we conclude that the imposition of consecutive sentences is inappropriate. We revise Spears's sentence to concurrent terms for the Class B and Class C felony convictions, resulting in an aggregate sentence of twenty years.

Conclusion

The trial court did not abuse its discretion in its evidentiary rulings. There was sufficient evidence to rebut Spears's entrapment defense. We reverse his consecutive sentences as inappropriate and revise them to concurrent terms for a total sentence of twenty years; we remand for the trial court to modify its orders accordingly and to notify the Department of Correction of this change.

Affirmed in part, reversed in part, and remanded.

BAKER, C.J., and CRONE, J., concur.